

Judge Blocks Prescription Discount Plan

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A federal court yesterday blocked President Bush's plan to offer prescription drug discount cards to elderly Americans by the beginning of next year, finding that the administration may have lacked the authority to create such a program without congressional approval.

The injunction, delighting pharmacy trade groups that lodged a lawsuit opposing the discount cards, came just two weeks before federal health officials had planned to take the first significant step to put the program in motion.

The injunction represents the second time a court has intervened to thwart a significant administration policy in the eight months since Bush took office. Last month, another federal judge halted the administration's effort to discourage the use of union-negotiated labor agreements, saying it violated the National Labor Relations Act.

Yesterday's decision by Judge Paul Friedman of the U.S. District Court of the District of Columbia does not guarantee an end to the pharmacy discount card plan. But officials at the White House and the Department of Health and Human Services acknowledged last night that his action will, at least, postpone the program for months.

Friedman predicted that the pharmacy groups had a "substantial likelihood of success" of winning their case on two grounds: that the administration lacked the legal authority to create the program and that it had not followed the proper rules for making regulations.

"Today's court decision is a loss for America's seniors," said White House spokesman Scott McLellan. "It will only further delay seniors being able to get the same drug discounts that other Americans received through private health plans."

HHS officials said they were reviewing their legal options and had not decided whether they would appeal the injunction. Tom Scully, administrator of HHS's Centers for Medicare and Medicaid Services, issued a statement last night that said: "Our goal remains to provide discounts to millions of seniors as soon as possible."

The discount card program, which Bush announced in a Rose Garden ceremony two months ago as he proposed a broad framework for modernizing Medicare, represents what he called "the first necessary step" by the administration to respond to widespread resentment of the prices many older Americans pay for medications.

Unlike most private insurance plans, the federal health insurance program that covers 39 million Americans age 65 and older pays for medicine that is prescribed in the hospital but not pharmaceuticals that people take at home.

Designed by HHS, the administration's plan relies on private companies that managed drug benefits to buy prescription drugs in bulk. Companies would sell cards to any Medicare patient who wanted one. In turn, patients could take their cards to pharmacies across the country to buy medicine at reduced rates.

Some 28 pharmacy benefit companies have told federal health officials they would like to take part. The agency has been reviewing their applications and had planned to announce in two weeks which ones it would endorse. After the endorsements, the companies could have started marketing their cards to Medicare patients.

The program has drawn intense opposition from the two organizations that represent the nation's pharmacies, which sued HHS five days after Bush's announcement. The organizations, the National Association of Chain

Drug Stores and the National Community Pharmacy Association, alleged the program is illegal, arguing that health officials had created it in "secret meetings," failed to allow the public participation required in drafting regulations, and lacked legal authority.

The pharmacy groups have contended that, based on the experience of discount cards already available in the private market, the savings would be relatively small. Their opposition is also rooted in fears that any discounts the program did provide older Americans would come at pharmacists' expense.

"We believe we'd bear an undue burden for this program, and the government failed to consult with us," Craig Fuller, president of the chain drugstore association, said after the judge's decision.

During a two-hour hearing, Justice Department attorneys argued on HHS's behalf that the agency had proper legal authority, even without explicit approval from Congress, because the new program would be related to Medicare. Even though the discount cards would not actually be covered by Medicare, the government lawyers said, Congress had given authority for the program when it gave the department broad latitude to run patient education programs.

In addition, the Justice attorneys sought to rebut the pharmacy groups' claim that the department should have given public notice that it was planning the program and invited public reaction. The government argued that HHS was not actually regulating private pharmacy discount programs -- but was merely creating a voluntary program for companies and patients.

Friedman, the judge, rejected both arguments.

The injunction, which has no specific time limit, surprised both sides, because Friedman rarely delivers oral decisions at the end of court hearings. Yesterday, however, he essentially blocked the administration's plans on an emergency basis, noting that harm would be done if HHS chose which companies could participate.

"We are pleased that the process has been stopped," said Fuller, of the drugstore association, "and we're hopeful that we will focus on a meaningful drug benefit for the nation's seniors."

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